MICHAEL RODAK, JR.,

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-323

ANTHONY GIORDANO,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Ninth Circuit

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To the United States Court of Appeals for the Ninth Circuit

Anthony Giordano, your petitioner, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled cause on April 30, 1974.

OPINIONS BELOW

Petitioner was one of seven defendants jointly tried in the United States District Court for the Central District of California. The other six defendants are Michael Santo Polizzi, Jack S.

Shapiro, Peter James Bellanca, Arthur J. Rooks, Anthony Joseph Zerilli and Emprise Corporation, a New York corporation. Petitioner and his co-defendants appealed to the United States Court of Appeals for the Ninth Circuit, and the appeals were consolidated in the Court of Appeals.

The consolidated cause was decided by a panel of the United States Court of Appeals on April 30, 1974. Each of the three judges wrote separate opinions on the issues raised on appeal, each judge writing on different issues. The opinions have not yet been officially reported. Those portions of the opinions relating to this petitioner and relevant to this petition are reproduced as Appendix A hereto. A complete copy of the opinions is attached as an Appendix to a separate petition for writ of certiorari being filed by the individual co-defendants.

On July 25, 1974, the Court of Appeals modified the opinions of April 30, 1974, in certain respects and denied petitions for rehearing and rejected suggestions for rehearing in banc. The modifying order has not yet been officially reported. It is reproduced as Appendix C hereto.

JURISDICTION

The judgment of the United States Court of Appeals was entered on April 30, 1974. (See Appendix B.) A timely petition for rehearing, with suggestion of appropriateness of rehearing in banc, was filed within the time as extended by the Court of Appeals. It was denied on July 25, 1974. (See Appendix C.)

On August 10, 1974, Mr Justice Douglas extended the time within which to file a petition for a writ of certiorari to September 23, 1974.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

I

Whether the Court of Appeals erred in approving the submission of the cause to the jury as to petitioner in view of the government's failure to present a submissible case against him.

II

Whether petitioner, as to whom a minute portion of the evidence in the eleven-week trial related, was entitled to a severance from his co-defendants.

III

Whether the long pre-indictment delay deprived petitioner of his constitutional rights in view of the intervening destruction of certain hotel records needed by the defense, although a portion of said records had been retained at the government's request.

IV

Whether petitioner, who rested at the close of the government's case, was entitled to a jury instruction at that time and at the close of the entire case that the jury was not to consider as to petitioner evidence presented during the balance of six weeks of the trial for the defense by co-defendants and the rebuttal by the government to said co-defendants' case.

V

Whether petitioner was deprived of his constitutional rights as a result of being a co-defendant in a lengthy conspiracy case,

most of which was unrelated to him, thereby presenting the question as to whether the unfairness and prejudice of the law as to conspiracy and joint trials should be reviewed and delineated.

VI

Whether certiorari should be granted for reasons contained in petitions for a writ of certiorari being filed by co-defendants Michael Santo Polizzi, Jack S. Shapiro, Peter James Bellanca, Arthur J. Rooks, Anthony Joseph Zerilli, and Emprise Corporation, who were jointly tried with this petitioner and whose convictions were jointly affirmed with this petitioner.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT INVOLVED

Constitution of the United States

Fifth Amendment

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state

and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Statutes of the United States

Title 18, United States Code.

§ 371. Conspiracy to Commit Offense or to Defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

§ 1952. Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

Federal Rules of Criminal Procedure

Rule 8. Joinder of Offenses and of Defendants.

(b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14. Relief From Prejudicial Joinder.

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance

of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

STATEMENT

Petitioner Anthony Giordano was convicted on the first count of a ten-count indictment. The first count alleged a conspiracy of petitioner, five other individual defendants (Polizzi, Shapiro, Bellanca, Rooks and Zerilli), and a defunct corporation (Emprise Corporation) to violate the Travel Act, Title 18, United States Code, Section 1952. There were also nine substantive counts for violation of the Travel Act, but none related to this petitioner.

Petitioner was tried jointly with his six co-defendants in the United States District Court for the Central District of California. There were a number of pretrial hearings in Los Angeles. (Petitioner has been a long-time resident of St. Louis, Missouri, and his attorney was also from St. Louis.)

The original trial judge assigned to this cause was the Honorable A. Andrew Hauk. Upon his recusal, the Honorable Gus E. Solomon of Portland, Oregon, considered many of the pretrial matters. Subsequently, Judge Solomon withdrew from the case, and it was reassigned to the Honorable David W. Williams of the Central District of California. He concluded all of the pretrial matters and presided at the lengthy trial, which commenced on February 15, 1972. The government rested on March 17, 1972, at which time petitioner rested; other defendants then presented evidence, the government presented rebuttal evidence, and the cause was finally submitted to the jury on April 20, 1972.

On April 26, 1972, the jury returned a verdict finding petitioner and all co-defendants guilty of the conspiracy charged and found other defendants guilty on all other counts submitted, with one exception.

Thereafter, post-trial motions were heard, including a one-week hearing on the taint of illegal electronic surveillance. All post-trial motions were overruled, and the defendants were sentenced, petitioner to a term of imprisonment for four years and a fine of $10,000.00.

Because the questions presented for review by this petition relate only to petitioner Giordano, we will not state all of the evidence generally, but it did comment very briefly on the evidence relating to petitioner Giordano. (See footnote 17 of Section XV of opinions below.)[1]

This petitioner has included in the appendix hereto only those portions of the opinions of the Court of Appeals pertaining to him and relevant to the questions presented by this petition. The full opinions of the Court of Appeals have, however, been reproduced in connection with petitions for a writ of certiorari filed by the co-defendants.

The government's theory of the case apparently[2] was that co-defendants Zerilli and Polizzi, residents of Detroit, Michigan, were interested in obtaining an ownership interest in the Frontier Hotel and gambling casino in Las Vegas, Nevada. Gambling is, of course, a legal business enterprise in the State of Nevada, subject to regulation by State authorities. The promoter of the Frontier Hotel was one Maurice Friedman, who at the time

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[1] A full statement of the facts in the case is contained in a separate volume of Appellants' Statement of Facts filed in the Court of Appeals, and this Court's attention is directed to that statement.

[2] We say apparently because the theory changed on a number of occasions throughout pretrial, trial and post-trial proceedings.

of trial was serving sentences in federal custody for numerous offenses, including violations of the Travel Act, perjury, etc., all of which were unrelated to this Frontier Hotel matter. It should be noted that Friedman denied any acquaintance with petitioner Giordano.

It became apparent that Zerilli and Polizzi would have difficulty in getting licensed by the Nevada gambling authorities, and according to their evidence, they lost interest in the enterprise. At about the same time, co-defendants Shapiro and Rooks, as well as others in the Detroit area, became interested as investors. Co-defendant Bellanca, a licensed attorney in the State of Michigan, represented some of the investors. Rooks borrowed some money from co-defendant Emprise Corporation, the home office of which was in Buffalo, New York. None of the defendants was a resident of the Los Angeles area.[3]

There was no evidence that petitioner Giordano had any participation in the promotion, organization or operation of the Frontier Hotel. None of the principal government witnesses relating to the organization of the hotel testified to even knowing him. Although the original interest of Zerilli and Polizzi in the prospective hotel occurred in March, 1966, and the hotel was not opened until July, 1967, and was sold in November, 1967, to Howard Hughes interests, evidence as to petitioner Giordano only related to one activity in September, 1967. It apparently was the government's theory, to be inferred only from telephone records, hotel records and other documents, that petitioner Giordano had some unexplained connection with an investment by Anthony Sansone and his father of St. Louis[4] in

[3] Although the hotel was located in Nevada and all of the individual defendants lived either in Detroit or St. Louis and Emprise Corporation was from New York, venue was obtained in California as a result of an allegation that certain trips by some of the Detroit defendants to Las Vegas required a stopover or change of planes in Los Angeles.

[4] The Sansones were not named as defendants or unindicted co-conspirators.

$150,000.00 of Class C debentures offered by Vegas Frontier, Inc. (VFI), the corporation operating the hotel and casino.

At a pretrial motion, the prosecutor told the District Court that he had proof that petitioner Giordano had invested money in VFI (11/13/71, R.T. 46).[5] After ten weeks of trial he had produced no such proof. His own witnesses denied that petitioner had any interest in a VFI investment.

Petitioner and his son William were engaged in a family business in St. Louis (19 R.T. 3635). Except for some hotel records (Exh. 78) reflecting short visits by Giordano to the Dunes Hotel in Las Vegas in 1966 and 1967 (and these records were incomplete in that other records desired by petitioner had already been destroyed according to a policy of the hotel—see Question III presented by this petition), and telephone company records (Exh. 49, 52 and 55) of charges for long-distance telephone calls between numbers to which petitioner and others had access and numbers to which Zerilli and others had access, petitioner and St. Louis were not mentioned in the evidence until the summer of 1967.

Friedman, the key government witness, testified that he was not aware that petitioner was in Las Vegas in early March, 1966, about the time of Friedman's original Reno trip to explore the establishment of the gambling enterprise (4 R.T. 803), or that petitioner checked out of the Dunes Hotel on the same day that Zerilli and Polizzi checked out of the Desert Inn (4 R.T. 811).[6] As a matter of fact, Friedman had never met petitioner (6 R.T. 1177).

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[5] As used herein, "R.T." refers to the Reporter's Transcript, either by date or volume and page. "Z.C.T." refers to the larger Clerk's Transcript submitted in conjunction with the appeals of Zerilli et al. There was also another Clerk's Transcript in the Emprise appeal.

[6] The question as asked by the prosecutor was not factually correct because the Desert Inn Hotel records indicated different dates

Petitioner and Joseph Cusumano, 80 years old at the time of trial (12 R.T. 2386), had been acquainted for many years and were distantly related (12 R.T. 2394). Joe Cusumano, a St. Louis resident, had established trusts for his children which were managed by his son Frank Cusumano, also of St Louis (12 R.T. 2375). The trusts loaned money, and on three occasions had made loans to petitioner and his wife (12 R.T. 2339, 2370-2372, 2379-2381). The first in 1964 was repaid on time, the second was in 1966 and was repaid on August 4, 1967, and the third loan was in May, 1968 (12 R.T. 2339-2340). On August 4, 1967, Mr. and Mrs. Giordano repaid the second loan in the amount of $15,000.00 plus 3% accrued interest (12 R.T. 2353, Exh. 10a, Item 6). The Court of Appeals characterized this loan as being past due, but interest was current and it was paid in full.

On August 28, 1967, the Cusumano Trust loaned $25,000.00 at 7% interest to Anthony Sansone (12 R.T. 2355-2356, 2418-2419, Exh. 10a, Item 7, Exh. 10, Item 7). Frank Cusumano and Sansone had been acquainted since childhood but had never had previous business dealings. They had no discussions as to the purpose of the loan (12 R.T. 2354-2355, 2373-2374, 2381, 2401, 2418-2419, 2456). There is no proof that petitioner had any knowledge of this loan.

Sansone and his deceased father, Anthony Sansone, Sr., who was also acquainted with petitioner and the elder Cusumano (12 R.T. 2343, 2401-2402), were both residents of the St. Louis area. They made numerous investments together (12 R.T. 2406, 2451), and were both in the real estate business (12 R.T. 2399, 2406, 2448). Some time in the summer of 1967 the elder Sansone told his son about the possibility of an

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for checkout by Zerilli and Polizzi. This was one of innumerable examples of misstatements on the record by the prosecutor affecting all defendants and for which the District Court took no remedial action.

investment in Las Vegas. The father was a frequent visitor to Las Vegas and he suggested that his son accumulate some money for this possible investment. At a later time the father told the son that the investment would be $150,000.00 (12 R.T. 2403-2404, 2417). The son was not a frequent visitor to Las Vegas and did not question his father as to the details of the loan for the reason that they trusted each other in their joint investments (12 R.T. 2406). The father and son were both interested in an investment in Las Vegas because of the possibility of future real estate investments in the Las Vegas area (12 R.T. 2425-2426). There was never any intention of either the father or the son to invest in VFI stock. As it developed, the investment was in Class C convertible debentures.

After his father mentioned the potential investment, the younger Sansone began to accumulate money from various sources—his own businesses and investments (Exh. 10, Items 1, 4, 8 and 9), his children's savings bonds (Exh. 10, Item 2), his parents (Exh. 10, Item 3), and the loan of $25,000.00 from the Cusumano Trust (Exh. 10, Item 7). His total investment was $150,000.00, for which he issued a check dated September 18, 1967 (Exh. 10, Item 10, 12 R.T. 2422). With his investment, he purchased Class C convertible debentures issued by VFI. Although the debentures returned 4% interest, they also provided an additional 4% if repurchased, and gave certain stock options. At the time Sansone purchased the debentures, the Nevada Gambling Board did not require a purchaser of Class C debtentures to file an invested capital questionnaire. According to Sansone, no one except members of his family was interested in the investment, and there was no evidence to the contrary.

Sansone and his wife went to Las Vegas in September, 1967, staying at the Frontier Hotel for several days. His father had told him to contact Shapiro (12 R.T. 2458), and after meeting

Shapiro for the first time on September 18, he made the investment of $150,000.00 in the Class C debentures (12 R.T. 2404-2405, 2423-2424, Exh. 10, Item 11). Subsequently Sansone received a letter dated November 6, 1967, from the Nevada Gaming Commission which required him, in accordance with a "new policy", to register in the same fashion as a gambler (12 R.T. 2429-2430, Exh. 10, Item 12). After discussing it with his father, they decided to sell the debenture because he did not want to become known as a gambler (12 R.T. 2430, 2452). (Sansone was also at the time a member of the Board of Directors of a St. Louis bank.) He returned to Las Vegas with his wife and stayed at the Frontier Hotel from November 12 to 17, 1967 (12 R.T. 2454, Exh. 67, Env. 6 and 7). At Shapiro's suggestion, he wrote T. W. Richardson, an officer of VFI, on November 19 asking that the corporation refund the money which he paid for the debenture (12 R.T. 2408-2409, 2432-2433, 2452, Exh. 10, Item 13). He received $157,085.02, which included interest (12 R.T. 2434, Exh. 10, Item 14).[7]

Sansone testified that he did not tell Frank Cusumano that the money borrowed from the trust was for an investment in Las Vegas (12 R.T. 2418-2419), and that he never discussed the investment with petitioner (12 R.T. 2456-2457). Cusumano testified that he did not discuss the loan to Sansone, Jr. with petitioner (12 R.T. 2375). There was no evidence that any of petitioner's money was a part of the loan to Sansone.

Although the records of the Dunes Hotel and the Frontier Hotel would indicate that Mr. and Mrs. Sansone and Mr. Giordano may have checked into their respective hotels at approximately the same time in September, 1967, Sansone denied traveling with petitioner (12 R.T. 2435-2436) or ever seeing

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[7] Shapiro substantially corroborated the testimony of Sansone as to the initial contact by the father and the subsequent purchase and repurchase of the Class C debentures (29 R.T. 5747-5755).

him in Las Vegas (12 R.T. 2457). As a matter of fact, Sansone and his wife traveled first class (12 R.T. 2449-2450), and the Giordano family always traveled tourist (12 R.T. 3639-3640). There was no proof that the Sansones and petitioner were ever on the same plane.

The only other defendant with whom Sansone was acquainted was Shapiro, with whom he had discussed the original investment after referral by his father (12 R.T. 2438). He was not acquainted with Bellanca, Zerilli or his father, Polizzi, Maurice Friedman, or any other person involved in the Frontier organization, with the possible exception that he had once played golf with a man named "Alex" (presumably Alex Kachinko, a deceased unindicted co-conspirator) (12 R.T. 2407, 2437-2438). Neither Cusumano knew any defendant other than petitioner, although the elder Cusumano knew Zerilli's father (12 R.T. 2338, 2369-2370, 2386). Neither Cusumano had ever been to Las Vegas (12 R.T. 2369, 2393).

In October, 1967, Joe Cusumano's son Vito had a personal problem in Detroit and the elder Cusumano went to Detroit with petitioner (12 R.T. 2388-2389), who has a number of relatives living in Detroit (12 R.T. 2390-2394). The government argued that this trip related to Frontier Hotel matters, although they had knowledge from the Cusumanos as well as an FBI agent prior to trial that the purpose of the trip was a family problem with Vito Cusumano (53 R.T. 10,550-10,552, 10,556-10,563). No one testified to any connection of the Detroit trip with the Sansone investment or the organization and financing of VFI. The prosecutor inferred that petitioner consulted with Zerilli in Detroit, but there was absolutely no evidence from which such a conclusion could be drawn.

There were records of telephone calls between numbers to which Zerilli had access and numbers in St. Louis to which petitioner had access (Exhs. 49, 52 and 55). Petitioner's son

William testified that he made some of the phone calls to Zerilli to seek his assistance in obtaining an automobile, at least one of such calls being from his father's house (12 R.T. 3641-3642, 3643-3644). Aside from the phone calls with reference to the purchase of automobiles, there was no evidence as to the contents of any telephone calls, most of which were of very short duration, or as to who made the calls.

William Giordano knew none of the defendants, other than his father and Zerilli, prior to coming to Los Angeles to testify (12 R.T. 3640). There was no evidence at the trial of any contact between petitioner and any other defendant or alleged co-conspirator with reference to Frontier Hotel matters. After petitioner had rested, Zerilli testified in his own behalf that he was acquainted with petitioner (24 R.T. 4753-4754), and Shapiro testified that he met petitioner at the Frontier Hotel either just before or just after the sale to Hughes, but he and petitioner never discussed Sansone, C debentures, or Frontier business (29 R.T. 5754-5755). There was no evidence that any other defendant or co-conspirator had been acquainted with petitioner prior to the indictment, and, as previously indicated, Friedman stated that he had never met petitioner (6 R.T. 1177).

This then was the substance of the testimony with reference to petitioner Giordano. The testimony consumed parts of only two days during the case in chief for the government. Petitioner presented no evidence in defense and the evidence of the government in rebuttal did not relate to him. Petitioner and his counsel were, of course, required to be present during the entire trial proceedings, although at one time during the pretrial stages, when Judge Solomon was discussing a motion for severance, one of the prosecutors suggested that petitioner could stay away from most of the trial and appear only when he was informed that the evidence would relate to him (7/9/71 R.T. 79-80). Judge Williams was not interested in such a suggestion.

At the close of the government's case, petitioner, being of the opinion that the evidence was insufficient and that no submissible case had been made against him, requested the Court to enter a judgment of acquittal, but that motion was denied. Thereupon petitioner, not intending to present any evidence in defense and being concerned as to the nature of prospective evidence by other defendants or by the government in rebuttal, requested the Court to give an immediate instruction to the jury to the effect that none of the evidence to come out subsequent to his resting could be considered against petitioner in the determination of his guilt or innocence or participation in the alleged conspiracy. The Court refused to give the instruction and refused to give a similarly requested instruction at the close of the entire case (38 R.T. 7750).

During the case presented by other co-defendants, much rancor developed between the prosecutor on the one hand and other defense counsel, as well as between the Court and other defense counsel. Evidence as to individual co-defendants was introduced which had no relationship to petitioner or even to the conspiracy charge. As a result, petitioner requested a severance on numerous occasions, and on one occasion the Court indicated that the motion for severance would be considered and denied on a daily basis (27 R.T. 5279-5280).

After deliberating for five days, the jury returned a verdict finding petitioner Giordano and his co-defendants guilty on the conspiracy count. (The jury also found other defendants guilty on all of the substantive counts submitted, with one exception.)

Petitioner Giordano had also been the subject of illegal electronic surveillance, having been a visitor at several premises where illegal surveillance had taken place, and his voice was recorded between 1963 and 1965. In the course of that surveillance, conversations between petitioner and Sansone's father-in-law were recorded, and discussions were had between peti-

tioner and others with reference to financial transactions with the Cusumanos. A post-trial hearing on the question of taint of the illegal surveillance lasted six days.

After all post-trial motions had been overruled, the Court sentenced all defendants. Sentences ranged from 90 days to four years imprisonment, plus fines. Petitioner was sentenced to four years imprisonment and a $10,000.00 fine (55 R.T. 10,973). Execution of the sentence has been stayed pending determination of this petition for a writ of certiorari.

Petitioner and his co-defendants appealed to the United States Court of Appeals for the Ninth Circuit. The cause was argued on September 5, 1973, and three opinions were filed by a panel of the Court (including one District Judge) on April 30, 1974. (See Appendix A hereto for portions relating to petitioner Giordano. See Appendix A to petitions for writ of certiorari filed in behalf of co-defendants Polizzi et al. and Emprise Corporation for the full opinions.) On July 25, 1974, the petition for rehearing of this petitioner, as well as those filed in behalf of all other appellants, was denied by the Court of Appeals; some modifications of the opinions were made but they were not significant to the issues presented by this petition. (See Appendix C.)

This petition for a writ of certiorari seeks to review the judgment of the Court of Appeals affirming petitioner's conviction.

REASONS FOR GRANTING THE WRIT

I

Submissible Case

We are aware that this Court generally does not review sufficiency of evidence;[*] nevertheless we feel constrained to raise this issue in this petition because of the utter lack of evidence against petitioner Giordano. The trial Court acknowledged that there was a "paucity of evidence" as to this petitioner (22 R.T. 4299). (Most dictionaries include "insufficiency" as a definition of "paucity.") Although summarily rejecting the argument on sufficiency of the evidence as to all other appellants (see Section XVII of the opinions below), the Court of Appeals devoted considerable discussion to the issue as to petitioner Giordano (see Section XV of the opinions below). The Court of Appeals stated that "the case against Giordano was the weakest." The paucity of such evidence is reiterated in footnote 16 of the opinions below where it is pointed out that the major government witnesses (Friedman and Feil) "offered no evidence implicating Giordano". Actually Feil never mentioned the name of Giordano, and Friedman testified that he did not know petitioner (6 R.T. 1177).

The lack of evidence against petitioner is so striking that it adds irrefutable argument to the issue raised by Question V of

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[*] See, however, *Vachon v. New Hampshire*, 414 U. S. 478 (1974), where this Court reversed a conviction per curiam for lack of evidence, stating (l.c. 480):

> "'It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged . . . violate[s] due process.' *Harris v. United States*, 404 U. S. 1232, 1233 (1971). (Douglas, J. in Chambers); *Thompson v. Louisville*, 362 U. S. 199 (1960); *Johnson v. Florida*, 391 U. S. 596 (1968); see also *Adderly v. Florida*, 385 U. S. 39, 44 (1966)."

this petition. It emphasizes the validity of the argument which we are presenting in this petition that petitioner Giordano was denied his Fifth Amendment due process rights.

Petitioner was indicted only on the conspiracy count and not as to any substantive count. The prosecution's evidence[9] fell into three categories in an effort to connect petitioner with the alleged conspiracy: (a) telephone records, (b) evidence of travels, and (c) the purchase of Class C debentures by Anthony Sansone of St. Louis. Petitioner Giordano offered no evidence, raising the issue presented by Question IV of this petition.

A. *Telephone records*: The records of telephone companies (Exhs. 49, 52, 55) indicated that there were some telephone charges for long-distance calls between numbers to which Zerilli had access and numbers to which petitioner had access. There was no evidence as to the persons making the calls or the contents of any of the calls, except that petitioner's son William, who was called as a prosecution witness, testified that he had had telephone conversations from the family business and from his parents' home in an effort to purchase an automobile through the assistance of Zerilli (12 R.T. 3641-3644). It is apparent that many of the phone calls were not even actually completed, because they were mostly station-to-station, for a minimum charge and period of time. Obviously someone placed a call to someone in another city and, on many occasions, did not complete the call because the person called was not there. That someone in St. Louis could have been petitioner, or his wife, or his son, or any other relative, friend or business associate or employee who had access to the telephones. In Detroit, a call could have been placed or received by Zerilli, his wife, his children, his parents or any other relative, friend or business associate or employee who had access to his tele-

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[9] As noted in Question II of this petition, less than 2% of the testimony in the transcript of the trial proceedings related to petitioner.

phone. Certainly this could not create evidence of conspiratorial misconduct!

The opinion of the Court of Appeals over-weighed the effect of this evidence. In the last paragraph of footnote 17, the opinion states that "there was a series of phone calls" on September 12. Actually, according to the evidence, there were three calls—one at a charge of 80 cents and two for $1.20—and a call the next day for 80 cents. It is obvious that there was very little, if any, conspiratorial conduct transacted in such calls, if they were completed.

We believe that in the circumstances of the record in this case, where there was no testimony by anyone that telephone conversations by petitioner did in fact take place or as to their content, the evidence of telephone company records of such calls was inadmissible. In a similar situation where copies of telephone company records and bills were offered, the Court in *United States v. Laughlin*, 226 F. Supp. 112, 113 (D.C. D.C. 1964), ruled the records inadmissible. These records subsequently became admissible in *Laughlin v. United States*, 385 F. 2d 287 (D.C. Cir. 1967), but there was actual testimony by one of the participants in the phone calls that the calls were in fact made and as to the contents of the call. The opinion of the Court of Appeals herein attempting to distinguish the *Laughlin* cases (see text at fn. 18 of the opinion) misconstrued those cases and is in conflict with them, a conflict which should be resolved by this Court.

B. *Travels*: Elsewhere in this petition we have shown that the Dunes Hotel records (Exh. 78) should not have been received in evidence. (See Question III.) But even if admissible, the records are similar to unexplained telephone records in that they do not prove that a trip was made. Even if they did, there was no evidence as to the purpose of the trip or that any conspiratorial misconduct took place.

Petitioner made a trip to Detroit in the company of the elder Cusumano in October, 1967. This evidence was unconnected with the events of this case and was so known to the prosecutor. (See testimony of F.B.I. Agent Bender at the post-trial hearing on illegal electronic surveillance.) The evidence of the Detroit trip should not have been admitted, but even if admissible, there was no evidence of any conspiratorial misconduct.

In the second paragraph of footnote 17, the opinion says that "Zerilli came to St. Louis for two days on June 8." Actually as reflected by the hotel records (Exh. 74), Zerilli apparently arrived late one night and left early the following morning, staying for only 9 hours and 57 minutes. Of course there was no evidence that he met with petitioner or Mr. Sansone on that trip.

The sinister implications of the sixth paragraph of footnote 17 of the opinion are just not borne out by the evidence. One need not go to Las Vegas just because he has business interests or relatives or to gamble. Innuendo and coincidence are the only bases for the incriminating findings by the Court of Appeals.

C. *Sansone's Class C debentures:* In footnote 17, the Court of Appeals devoted most of its space to the purchase of Class C debentures by Anthony Sansone of St. Louis, and implies a connection to petitioner, without any evidence thereof. That petitioner and his wife on August 4, 1967, repaid $15,000.00 which they had borrowed from the Cusumano trust (12 R.T. 2353; Exh. 10a, Item 6),[10] and that on August 28, 1967,[11] the Cusumano trust loaned $25,000.00 to Mr. Sansone (12

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[10] The opinion characterizes the loan as "overdue"; more correctly, it could be described as "extended", because all interest was current.

[11] The opinion says the 24 days between August 4 and August 28 was "less than three weeks."

R.T. 2355-2356, 2418-2419; Exh. 10a, Item 7; Exh. 10, Item 7) illustrates a classic non sequitur of the opinion. There was no evidence of any connection between the repayment by the Giordanos and the subsequent loan to Mr. Sansone. Obviously Mr. Sansone was borrowing a small portion of a larger amount he needed for a private investment in behalf of his family. After due investigation of the investment in Las Vegas by Mr. Sansone and his father, he bought $150,000.00 in Class C debentures of V.F.I. (12 R.T. 2404-2405, 2423-2424).

The Court of Appeals suggests that there was something sinister in the fact that Mr. Sansone borrowed $25,000.00 at 7% interest for a debenture which yielded 4%, and characterizes it is "an anomaly for which Sansone had no convincing explanation." Actually Mr. Sansone fully explained the transaction. He borrowed only a small portion of the money that he needed for the total investment in Las Vegas. The debentures yielded more than 4%, because they had stock options, and in fact Mr. Sansone was repaid 8% rather than 4%.

When Mr. Sansone learned that he would be required to register, pursuant to a new policy, with the Nevada gaming authorities in the same fashion as any gambler, he changed his mind about the investment and requested a refund which he received (12 R.T. 2408-2409, 2429-2430, 2432-2434, 2452, 2454; 29 R.T. 5747-5754). Mr. Sansone fully explained the reasons for his change of mind; the Court of Appeals completely disregarded his explanation that he did not want to register as a gambler and thereby jeopardize his investments in St. Louis, where gambling is not legal and where his gambling registration would most likely be misconstrued.

Despite the unsupported implications to the contrary in the opinion, there was never any connection of petitioner with the Sansone transaction. The prosecution's evidence not only failed to show a connection, but in fact it was to the contrary and

clearly and unequivocally absolved petitioner of any involvement. Mr. Cusumano and Mr. Sansone were both witnesses for the prosecution, and the prosecution vouched for their credibility by putting them on the stand. Mr. Sansone testified that he had no discussions with Frank Cusumano as to his reason for borrowing the money and that Mr. Cusumano did not know that it was related to Las Vegas (12 R.T. 2418-2419). Mr. Sansone also testified that he never discussed the investment with petitioner (12 R.T. 2456-2457). Frank Cusumano testified that he never discussed the Sansone loan with petitioner, and that petitioner was not aware of the Sansone loan (12 R.T. 2375).

The Court of Appeals suggests that the Cusumanos and Sansone lied for petitioner Giordano. There is no basis in the record for such an accusation. There was no evidence that they were "interested witnesses with motives to dissemble about Giordano's role", nor is there any foundation for the statement in the opinion that these witnesses "have every reason to protect the defense." These witnesses were reputable businessmen who were called and vouched for by the government, and they were not contradicted by any other witnesses or documents.

The evidence presented by the prosecution was in direct contradiction of their theory as to petitioner's involvement. Inasmuch as there was no evidence to support the prosecution's theory, the prosecution should not have been permitted to argue contrary to their own evidence, and the Court of Appeals should not have approved such an argument. The case should not have been submitted to the jury in the light of such evidence.

In *Causey v. United States*, 352 F. 2d 203, 206-207 (5th Cir. 1965), the Court pointed out that the testimony of a "witness tendered by the Government, for whose credibility the Government vouched by putting her on the stand, . . . actually exculpates him (the defendant) of any guilty knowledge or par-

ticipation at that period of the conspiracy." The Court in *Causey* would not permit probabilities or unexplained evidence to "fill all the big gaps in this proof and establish beyond a reasonable doubt that (the defendant) is guilty of each and every essential ingredient of the alleged crime." The language of *Causey* is particularly appropriate (l.c. 207):

> "Many of the guiding principles of the law of conspiracy are too well established to require elaboration here. We enumerate a few which are of particular applicability to a case of the kind now to be decided. To establish the intent essential to a conviction for conspiracy the evidence of knowledge must be clear and not equivocal. A suspicion, however strong, is not proof and will not serve in lieu of proof. Charges of conspiracy are not to be made by piling inference upon inference. Guilt of conspiracy may not be inferred by mere association. It is true that the proof may be circumstantial or direct or both, but it must convince beyond a reasonable doubt that a conspiracy existed, that the defendant knew it, and with that knowledge intentionally did some act or thing to further or carry on that conspiracy.
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> "The evidence before us is not of a conflicting nature. The Defendant offered no proof. We indulge that view of the evidence most favorable to the government. The Prosecution certainly proved that by association with the known guilty parties (the defendant) had an opportunity to become a conspirator. It did not prove that the crime followed the opportunity. We are thus compelled to hold that the judgment of acquittal as to the conspiracy count against (the defendant) should also have been granted."

That the government may not disregard its own uncontradicted evidence is also made clear in *United States v. Di Re*, 332 U.S. 581, 594 (1948), where this Court said:

> "Any inference that everyone on the scene of a crime is a party to it must disappear if the Government informer singles out the guilty person."

The situation here is that all of the prosecution's evidence exculpated petitioner. There was absolutely no evidence to the contrary. The key witnesses for the prosecution did not involve petitioner in any way. His name was not mentioned by Feil. Friedman testified that he did not know petitioner (6 R.T. 1177). Another key government witness, Swartz, made no mention of petitioner. There were only five witnesses in the case who mentioned petitioner, and not one of them implicated him.

When all of the prosecution evidence is considered, there was certainly no evidence from which a conviction of petitioner could result. Accordingly, petitioner elected not to present any evidence (22 R.T. 4312-4313, 4317). There was indeed an insufficiency of evidence, and based upon the lack of evidence and the law, petitioner's motion for judgment of acquittal should have been sustained.

The evidence created not even a suspicion against petitioner. The cases in this Court are clear that suspicion, surmise, inference, knowledge, and evidence of association or acquaintance are not sufficient to sustain a conviction. See *United States v. Falcone*, 311 U.S. 205, 210 (1940), *Direct Sales Company v. United States*, 319 U.S. 703, 711 (1943), *Ingram v. United States*, 360 U.S. 672, 677-680 (1959), and *United States v. Di Re*, 332 U.S. 581, 593 (1948), where it is said:

> "Presumptions of guilt are not lightly to be indulged from mere meetings."

There was no evidence that petitioner was acquainted with any other defendant or alleged co-conspirator except defendant Zerilli, but evidence of a mere acquaintance between these two is certainly not sufficient to support a finding of guilt as to peti-

tioner. To sustain a conviction on the basis of such acquaintance, as the Court of Appeals here did, brings its decision in conflict with decisions of other circuits, such as *United States v. Grimes*, 332 F. 2d 1014, 1016-1017 (6th Cir. 1964), *Glover v. United States*, 306 F. 2d 594, 595 (10th Cir. 1962), and *United States v. Barnes*, 383 F. 2d 287, 291-293 (6th Cir. 1967), a case also involving charges of conspiracy to violate Section 1952.

When all of the evidence at the lengthy trial is considered, it is apparent that there was no proof of a conspiracy. But even assuming arguendo that a conspiracy was shown, there was certainly no evidence to show that petitioner was a part of it. The mere fact that he may have been in Las Vegas at certain times or that certain telephone calls may have been made by someone, without any proof as to their content, does not even create a suspicion of illegal conduct by petitioner—especially in view of his complete exoneration by the prosecution witnesses.

For these reasons the conviction of petitioner cannot stand. His motion for judgment of acquittal should have been granted, and the action of the Court of Appeals in affirming his conviction was erroneous. It conflicts with decisions of other circuits and this Court. It also denies to petitioner basic rights guaranteed to him by the Fifth Amendment.

Because of the conflict with other circuits and this Court, and because of the importance of the due process issue of convictions without evidence in the administration of criminal justice, we respectfully suggest that certiorari should be granted as to this Question.

II

Severance

Petitioner was tried with six other defendants but was named in only one count—the conspiracy. Of 58 overt acts designated in the conspiracy which covered more than a year and a half, petitioner was mentioned in only one act (paragraph 53) involving one day.

At once petitioner moved for a severance. The prosecution acknowledged at oral argument that there was very little evidence pertaining to him, and at the hearing on July 9, 1971, a prosecutor made the novel suggestion that inasmuch as so little of the trial would relate to petitioner, he could stay away from most of the trial (7/9/71 R.T. 79-80).

The pre-trial motion for severance was denied upon certain assurances by the prosecutor as to the nature of the evidence against petitioner, but such evidence never appeared at the trial. Prior to trial, petitioner and his counsel were required to make numerous trips between St. Louis (where they lived) and Los Angeles to appear at pre-trial proceedings. Counsel traveled from St. Louis to Hattiesburg, Mississippi to attend a deposition requested by the government of their witness T. W. Richardson, only to find, after a full day of testimony, that petitioner was not even mentioned.

For approximately eleven weeks during the trial, petitioner and his counsel lived in California. Testimony on parts of only two days (March 3 and March 14) had any connection with petitioner. Of approximately 42 witnesses called by the prosecution, only five, of very short duration (approximately 140 of 8000 reporter's transcript pages), related to petitioner—the two Cusumanos, Sansone, petitioner's son, and a clerk of the Dunes Hotel. Stacks of exhibits were thrust upon the jury, but only an infinitesimal portion were directed toward petitioner.

The prime government witnesses testified to no activities of petitioner. Mr. Giordano's name was not mentioned by Feil or Swartz, and when Friedman was asked by the prosecutor whether he had ever met a man named Anthony Giordano, he answered "I don't believe so, sir." (6 R.T. 1177).

After the government rested, petitioner immediately rested. His participation in the trial from that point on was even less than before. From March 17 when he rested (22 R.T. 4317) until April 12 when all parties rested (38 R.T. 7779), petitioner could do nothing except preserve his record by numerous requests for his severance. At one point the Court even directed that the record would show that the severance motion would be overruled on a daily basis (27 R.T. 5279-5280). Petitioner could only sit and suffer in helpless silence as the trial atmosphere deteriorated from such events as references to the Mafia, James Hoffa, and skimming, from prejudicial newspaper publicity and further straining of relations between the prosecution and the Court on the one side and more active defense counsel on the other. By the time the case was submitted to the jury, the position of petitioner as a separate person who had long since rested was not even a blurred memory in a jury exposed to all the prejudice in this record.

We will not lengthen this petition by quoting extensively from the oft-cited concurrence of Mr. Justice Jackson in *Krulewitch v. United States*, 336 U.S. 440 (1949). The evils of conspiracy trials, as more fully presented in Question V of this petition, were never more obvious than in their application to petitioner in this case. Certainly petitioner was in "an uneasy seat"—it was impossible, not just difficult for him "to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together." (336 U. S. at 454)

The opinion of the Court of Appeals (Section XIII) seems to suggest that the denial of a severance prior to trial was justi-

fied because of representations by the government that petitioner was a "leader" in the unlawful scheme, and the furnishing of a summary of the evidence to be offered against him. In a gross understatement, the opinion states that "the evidence against Giordano did not entirely justify government counsel's optimistic forecast." Thus the Court of Appeals encourages prosecutorial misrepresentations to the Court so as to avoid a severance. Although the Court states that there was no suggestion of bad faith, we respectfully submit that good faith should be a matter for affirmative proof by the prosecutor, rather than casting upon the defendant an impossible burden of showing bad faith.

In ruling that the denial of a severance before and during trial was proper, the Ninth Circuit is in conflict with numerous decisions of other Courts of Appeals. See, for example, *United States v. Spector*, 326 F. 2d 345 (7th Cir. 1963); *United States v. Kelly*, 349 F. 2d 720 (2nd Cir. 1965); *United States v. Branker*, 395 F. 2d 881 (2nd Cir. 1968); and *United States v. Harris*, 458 F. 2d 670, 673 (5th Cir. 1972), where the Court stated:

> "If, as a practical matter, the natures of the offenses or of the evidence are of such a character or are so complicated that a jury could not reasonably be expected to separate the indictments or the defendants and to evaluate the evidence properly and individually against each separate defendant on each separate charge, then the trial judge should sever the trials."

In *United States v. Branker*, 395 F. 2d 881 (2nd Cir. 1968), the Court reversed because of the failure to grant a severance, noting that two of the defendants who should have been severed estimated "that fewer than 150 pages of the nearly 7000 page transcript contained testimony relating to each of" those defendants. (As indicated previously, fewer pages related to petitioner here.) The Court said in *Branker* (l.c. 888):

> "This kind of prejudice is particularly injurious to defendants who are charged in only a few of the many counts, who are involved in only a small proportion of the evidence, and who are linked with only one or two of their co-defendants. The jury is subjected to weeks of trial dealing with dozens of incidents of criminal misconduct which do not involve these defendants in any way. As trial days go by, 'the mounting proof of the guilt of one is likely to affect another.' (Numerous cases cited.)"

The statement by the Ninth Circuit here that the "trial judge took great pains to protect Giordano's right to an independent evaluation by the jury of the evidence against him" is not borne out by the record. The instructions were standard for any multi-defendant case, and the trial Court refused to give a proper instruction requested by petitioner to protect his own interests. (See Question IV presented by this petition.) And as said in *United States v. Kelly*, 349 F. 2d 720, 758 (2nd Cir. 1965), cert. den. 384 U. S. 947 (1966): "No amount of cautionary instructions could have undone the harm." The instructions did not "scrupulously safeguard (petitioner) individually, as far as possible, from loss of identity in the mass." *Kotteakos v. United States*, 328 U. S. 750, 776 (1946).

In footnote 11, the opinion of the Ninth Circuit attempts to distinguish cases in which quantity of evidence has been considered important, and holds that a different rule applies in conspiracy cases. No such distinction is valid, especially where, as here, the only allegation in the indictment and the only proof aimed at petitioner related to a single incident in September, 1967. (See Indictment, overt act 53.) No one testified to any involvement of petitioner in the "conspiracy" which was supposed to have commenced a year and a half earlier. Considering substance over form, the complaint and proof directed at petitioner was no different from a single substantive charge. The mere allegation of conspiracy, without proof

thereof, cannot justify a requirement of attendance at an eleven-week trial saturated with errors which the Court below recognized and for which petitioner Giordano had no causal connection.

The Court of Appeals adopted the prosecution's assertions "that a separate trial would be substantially as long as a joint one, since a full exposition of the entire scheme was necessary to establish the significance of Giordano's separate conduct," and that "all or substantially all such evidence probably would have been introduced in a separate trial."[12] As a practical matter, an eleven-week trial would not have been necessary. The issue as to petitioner was not whether a conspiracy to violate Section 1952 existed, but whether he was a party to any such conspiracy. Thus, days of cross-examination of government witnesses by other defense attorneys and weeks of defense testimony by other defendants on the issue of whether there was a conspiracy would have been unnecessary at a separate trial. Actually the prosecutor prior to trial acknowledged the irrelevancy of most of the evidence as to petitioner when he suggested that petitioner could stay away from most of the trial (7/9/71 R.T. 79-80).

The trial of this case could have taken a few days at a separate trial for petitioner. A simple issue as to whether or not petitioner was a member of a conspiracy is all that need have been tried. The rancor and multiple errors of the trial could have been avoided.

The joinder of all defendants was not proper under Rule 8(b) of the Federal Rules of Criminal Procedure. Petitioner should have been granted relief by severance under Rule 14.

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[12] The additional time and effort (and presumably cost) of a separate trial should not have been matters of concern to the Court of Appeals, for "our Government is not one of mere convenience or efficiency." *Kotteakos v. United States*, 328 U. S. 750, 773 (1946).

Because of the conflict between the opinion below and opinions of other circuits, and because of the importance of this issue in the administration of criminal justice, especially as it relates to the issues presented in Question V of this petition, and because of the due process impediments thrust upon petitioner by the joint trial, we respectfully suggest that certiorari should be granted as to this Question.

III

Pre-Indictment Delay (Dunes Hotel Records)

On February 22, 1972, during trial, petitioner filed a motion to suppress certain records of the Dunes Hotel in Las Vegas (Exh. 78). The basis of the motion was that, by the time the indictment had been returned, some Dunes Hotel records relating to petitioner had been obtained and preserved by the government, but all other hotel records covering the same periods of time had been destroyed in accordance with routine hotel policy. Petitioner asserted that the delay in indictment prevented him from obtaining evidence in his behalf, and that the failure to accord him a speedy trial deprived him of due process within the constitutional framework.

Petitioner's motion was supported by an affidavit of the hotel's assistant controller and was further confirmed by the testimony of Mr. Gustin, General Manager of the Dunes Hotel (19 R.T. 3631-3632). Because of the destruction of the other hotel records, petitioner was unable to obtain records which might have explained the non-incriminating purpose of his numerous visits to the hotel.

Exhibit 78 was used by the government to show that there were records of visits by petitioner to the Dunes Hotel in September and November, 1967, at approximately the same time that Mr. Sansone was a guest of the Frontier Hotel. From the coincidence of these visits, the government argued, and the Court of Appeals affirmed (see paragraph 6 of footnote 17 in Section

XV of the opinion), that petitioner and Mr. Sansone must have traveled together and that petitioner must have played a sinister role in the brief Sansone investment in Class C debentures of the Frontier Hotel.

Thus it was vital to petitioner to offer some explanation for his visits to Las Vegas which would show a reason for his being there other than a relationship to Mr. Sansone and the Frontier Hotel. If petitioner had traveled on either or both of the dates with someone else and if through access to Dunes Hotel records he could have located other persons who stayed at the Dunes with him on those particular dates, he would have been able to explain the innocent purpose of his visits to Las Vegas. As a matter of fact, the Dunes Hotel record of petitioner in September, 1967, shows that there were two guests in his party, but without access to other hotel records, it was impossible for petitioner to determine who the other person on the trip was. Thus the identity of a crucial witness for petitioner was unavailable because of the lapse of time. The visits were in 1967 and by the time petitioner became aware that he was under suspicion (when he was indicted in February, 1971), all of these explanatory records of the Dunes Hotel had already been destroyed according to routine hotel policy.

The facts herein and the prejudice to petitioner bring this case squarely within the doctrine announced by this Court in *United States v. Marion*, 404 U.S. 307 (1971) and *Barker v. Wingo*, 407 U.S. 514 (1972). As said in *Marion* (l.c. 34):

> "Passage of time, whether before or after arrest, may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself."

Although the constitutional claim was not sustained in *Marion* because there was no actual prejudice shown, this Court there recognized that "events of the trial may demonstrate actual

prejudice." In the instant case the actual prejudice was indeed shown at the trial because of the destruction of material evidence and the inability to secure witnesses.

The factor of prejudice was discussed by this Court in *Barker v. Wingo*, a case which, although cited to the Court of Appeals herein, was completely ignored in the opinion. In *Barker*, this Court said that the most serious interest to be protected by the right to a speedy trial is to limit the possibility that the defense will be impaired. This is the most serious "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown." (407 U.S. at 532.)

The opinion of the Court of Appeals characterizes petitioner's contention as frivolous and merely suggests that the Sixth Amendment does not apply to pre-indictment delay and that petitioner had failed to show that the delay violated the due process clause. We are not contending that the Sixth Amendment applies to pre-indictment delay, but we do believe the evidence as detailed above clearly showed a due process violation because of the inability to have necessary process for witnesses and documentary evidence.

The prejudice to petitioner was obvious. Aside from outright dismissal of the charges, the only means by which petitioner could have been protected was to bar the government from the use of the incomplete excerpts of the Dunes Hotel records which it had salvaged. The motion to suppress the evidence of the hotel records should have been sustained. Their admission was error requiring a reversal.

We believe that *United States v. Marion* and *Barker v. Wingo* are so clearly applicable to this question that an appropriate

disposition could be summary per curiam reversal of the judgment of the Court of Appeals. On the other hand, this Court might want to review the scope of appropriate remedies for violations of due process occasioned by pre-indictment delay. Should charges be dismissed, or is suppression of evidence an appropriate and adequate remedy? Although the scope of the remedy has not been fully explored in *United States v. Marion* and *Barker v. Wingo*, the issue is one which frequently arises in trial courts, and it would be appropriate for this Court to determine guidelines for the administration of criminal justice in all courts.

Because of the conflict with the opinions of this Court, and the importance of this constitutional question in the administration of criminal justice, we respectfully suggest that certiorari should be granted as to this Question, and either the judgment below should be summarily reversed or the Question should be placed on the calendar for oral argument.

IV

Instruction After Resting

After the government had rested and various motions for judgment of acquittal at the close of the government's case had been overruled, other defendants began their case, but petitioner Giordano rested without the presentation of any evidence (22 R.T. 4317). The subject of the jury's consideration against petitioner of any evidence in the case subsequent to his resting was discussed at the time (22 R.T. 4313-4314, 4382). Before the commencement of Court on March 21, 1972, petitioner requested in writing that the Court immediately instruct the jury:

> "The prosecution has rested and the defendant Giordano has also rested. Later in this trial you will be called upon to determine the issue of whether the defendant Giordano

is guilty or innocent of the conspiracy charge against him contained in Count I of the Indictment. But before such determination, other defendants may present evidence in their behalf and the prosecution may present further evidence in rebuttal.

"The Court instructs the jury that, in ultimately determining the guilt or innocence of the defendant Giordano, you must disregard all evidence to be introduced hereafter and may consider only such evidence as has been introduced in this trial up to the present time."

Thereafter on March 24, 1972, defendant Zerilli was being cross-examined by government counsel. Just prior to the noon recess the prosecutor announced that "I am moving to the area of Mr. Giordano." (27 R.T. 5352). Immediately[13] counsel for petitioner prepared a hand-written request for an instruction that "prior to any such interrogation, that any evidence adduced by the prosecution may not be considered as to defendant Giordano."

The subject of petitioner's resting again came up when the prosecution began to offer rebuttal evidence. Petitioner objected to such rebuttal evidence and requested an instruction that rebuttal evidence not be considered against him. This request was also denied (36 R.T. 7325-7326).

Finally in the discussions on instructions for the jury petitioner renewed his request "that the jury be instructed to disregard any evidence that may have come in in the defendants' case or in the Government's rebuttal or defendants' surrebuttal."

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[13] The request was filed with the Clerk at 1:00 P.M., prior to the commencement of the afternoon session and before any questioning by the prosecutor of Mr. Zerilli concerning petitioner. Consistent with the procedural aloofness adopted by the Court, this request was not formally ruled upon by the Court. It would appear that it received a "waste-basket" ruling. The prosecutor did in fact interrogate Mr. Zerilli as to petitioner (27 R.T. 5353-5355).

The Court did not give the requested instruction (38 R.T. 7750).

That the government took advantage of evidence which came in subsequent to the resting of petitioner and attempted to use such evidence to bolster its non-existent case against him was openly admitted by the prosecutor in the argument on motions for judgment of acquittal at the close of the entire case (38 R.T. 7847-7850), where he stated:

> "I wanted to say that about the defendant Giordano in light of what Mr. Baris says, in order to show you how the case on Giordano has improved significantly since the last time we argued this motion."

Throughout those portions of his closing argument devoted to petitioner, government counsel referred to evidence which came in subsequent to his resting and frequently argued that a conspiracy charge had been proved against petitioner by the testimony of other defendants. When petitioner's counsel attempted to object to such statements, the Court not only refused to correct the error, but chastised defense counsel (39 R.T. 7957). Some of this improper argument appears at 39 R.T. 7953-7956, 7958, 7961, 7965.

Thus, after petitioner Giordano rested, he was required to sit for weeks in a trial which, from that point on, could not legally concern him. Petitioner rested on March 17, 1972 (22 R.T. 4317), and closing arguments began on April 13, 1972 (39 R.T. 7896). Even if his severance had been properly denied (see Question II), at the very least petitioner was entitled to the simple instruction he requested to protect his interests and to guide the jury in their consideration of only that evidence which was admissible against him.

United States v. Schneiderman, 106 F. Supp. 906, 928 (S.D. Calif. 1952) is a conspiracy case in point. That eminent au-

thority on instructions, District Judge Mathes, gave the following instruction there:

> "Once a defendant rests, no evidence thereafter received may be considered in connection with the case as to that defendant. Hence none of the evidence received after the close of the prosecution's case in chief may be considered in connection with the cases of defendants . . ., since those ten defendants rested their cases immediately following the close of the prosecution's case in chief."

The Court of Appeals disregarded the *Schneiderman* case, stating in footnote 14 of Section XIV that "there was no discussion in Schneiderman of the issue." (Perhaps the instruction was so correct that neither side felt it necessary to discuss the issue.) The Court of Appeals also acknowledged two other authorities supporting the propriety of the instruction: District Judge Wyzanski in *United States v. Interstate Engineering Corp.*, 288 F. Supp. 402, 413-414 (D. N.H. 1967), and Devitt and Blackmar, *Federal Jury Instructions*, § 10.06 (1970). No authority was cited by the Court of Appeals in which such an instruction was disapproved.

An instruction in the form requested should have been given to the jury. Because of the length of the trial and the deliberate efforts of the prosecutor to attempt to create evidence against petitioner after he rested, the instruction should have been given as a precautionary measure for the jury after the resting. (Had it been given only at the close of the case, we doubt that the jury could then have weeded out that evidence which they should not have considered. See also Question V of this petition.) But irrespective of when it should have been given, the fact remains that, under the authorities cited and in the interests of justice, it should have been given and it was not.

Because of the refusal of the Court below to follow other decisions and authorities, and because of the importance of this

issue in the administration of criminal justice and in the application of due process to defendants in criminal causes, we respectfully suggest that certiorari should be granted as to this Question.

V

Constitutionality of Conspiracy Cases

Since this Court decided *Krulewitch v. United States*, 336 U.S. 440 (1949), the decision, and particularly the concurring opinion of Mr. Justice Jackson, has generated massive discussion in and out of courthouses concerning the effect of conspiracy trials on individual defendants. Nowhere have the evils which troubled Mr. Justice Jackson and subsequent writers been more alarming than in this case as to petitioner Giordano.

Here is a man who, perhaps because of the foreign sound of his name, perhaps because of his acquaintance with co-defendant Zerilli, or perhaps because of some other undisclosed irrelevancy, was made a defendant with an allegation of a single innocuous transaction in September, 1967, in an alleged conspiracy that lasted for over a year and a half. As a result, he and his counsel were required to spend eleven weeks in Los Angeles, away from home and family in St. Louis, as little more than spectators in a case that did not concern him, only to be caught up in the stream of innuendos, suspicions, accusations, irrelevancies and other prosecutorial machinations, and to discover that by the time the cause was submitted to the jury, his own lack of involvement was so obscured that he ended up as a shadowy blur in the conviction of all defendants.

Petitioner's attempts to protect himself were unavailing. He was denied a severance (see Question II of this petition), crucial evidence was no longer available (see Question III), and his requests for protective instructions were denied (see Question IV).

There was no evidence against him (see Question I). At one point the prosecutor recognized the almost complete lack of involvement of petitioner by suggesting that he could stay home during most of the trial (7/9/71 R.T. 79-80).

When the trial began to get out of hand with ill-feeling between the prosecutor and other defense counsel and at times between the Court and other defense counsel, petitioner was helpless to protect himself. A vast amount of errors were indeed committed, as recognized by the opinion of the Court of Appeals (see Question VI of petition for a writ of certiorari filed by Polizzi et al.). As the trial degenerated into arguments over Mafia involvement (see Question I of Polizzi petition), James Hoffa, prejudicial publicity (see Question II of Polizzi petition) and numerous other matters (see Polizzi petition and petition for certiorari filed by Emprise Corporation), petitioner could do nothing except to present daily motions for severance and mistrial, which were overruled on a daily basis (27 R.T. 5279-5280). Petitioner's right to a speedy trial guaranteed by the Sixth Amendment to the Constitution of the United States was ignored during the long period after he rested.

> "This case illustrates a present drift in the federal law of conspiracy which warrants some further comment because it is characteristic of the long evolution of that elastic, sprawling and pervasive offense."

So spoke Mr. Justice Jackson in *Krulewitch* (336 U.S. at 445). We could take practically every line of Mr. Justice Jackson's concurrence and show how the dangers which he feared became a nightmare to petitioner, but we will not lengthen this petition with such a detailed analysis. Suffice it to say that the following evils occurred in the instant case: a charge of conspiracy in lieu of a substantive offense (336 U.S. at p. 445), trivialization (p. 449), aggravation of the degree of crime (p. 449), the scattergun technique (p. 452), a movable venue far from home (pp. 452-453), a hodgepodge of evidence (p. 453), the use of ac-

complices (p. 454), an "uneasy seat" next to co-defendants (p. 454), acts and declarations of alleged co-conspirators (p. 455), relaxation of rigid standards to sustain convictions (p. 457).

The Annual Report of the Attorney General of the United States for 1925, pp. 5-6, included warnings from senior circuit judges as to the dangers of conspiracy prosecutions; the warnings are ignored by modern prosecutors. Numerous law review articles have been written about the conspiracy doctrine, "the darling of the modern prosecutor's nursery" (*Harrison v. United States*, 7 F. 2d 259, 263 (2nd Cir. 1925)). See Klein, *Conspiracy—The Prosecutor's Darling*, 24 Brooklyn L.Rev. 1 (1957).)

In Weinreb, *The Threat of Unfairness in Conspiracy Prosecutions: A Proposal for Procedural Reform*, 2 N.Y.U. Rev. of Law and Social Change 1, 10 (1972), some of the evils of conspiracy prosecutions are pointed out:

> "To summarize, a defendant who faces trial for criminal conspiracy is at a disadvantage in several respects. First, he is subject to rules of proof at trial which allow the criminal act (the agreement) to be proven by indirect, circumstantial and sometimes only remotely relevant evidence, and which provide inadequate barriers against inadmissible hearsay. Secondly, he risks guilt by association; the merits of his own case become lost in the general picture of conspiracy that is painted at trial. Third, he may find himself indicted for conspiracy rather than for a substantive crime, in order for the prosecutor to take advantage of his favored position at trial. Finally, if he has been accused of a crime that has been completed, the task of defending his innocence at trial may be made much more difficult by the insertion of a conspiracy count into the indictment for the purpose of easing the way to conviction for the substantive crime."

See also Burns, *Conspiracy Prosecutions in the Federal Courts*, 40 Journal of Criminal Law and Criminology 760 (1950); Ball, *Criminal Conspiracy: A Balance Between the Protection of Society and the Rights of the Individual*, 16 St. Louis U.L.J. 254 (1971); Lorenz, *Conspiracy in the Proposed Federal Criminal Code: Too Little Reform*, 47 Tulane L. Rev. 1017 (1973); and Goldstein, *The Krulewitch Warning: Guilt by Association*, 54 Georgetown L.J. 133 (1965), where it is said (at p. 134):

> "But even more significant (Mr. Justice) Jackson's views, as expressed in *Krulewitch* have awakened in many lawyers and judges an air of caution and 'a sense of injustice.' "

The "air of caution" became polluted early in the proceedings against petitioner. The injustice was not just sensed—it was obvious to all except apparently the prosecutor and Court.

The public outcry which still exists as to abuses in conspiracy trials suggests that this case would be an appropriate one for review of the limits to which conspiracy accusations can be extended.

Because of the importance of this issue in the administration of criminal justice, we respectfully suggest that certiorari should be granted as to this Question.

VI

Other Reasons

Petitioner was tried jointly with Michael Santo Polizzi, Jack S. Shapiro, Peter James Bellanca, Arthur J. Rooks, Anthony Joseph Zerilli, and Emprise Corporation, and their convictions were jointly affirmed by the Court of Appeals. The five other individuals are filing a separate joint petition for a writ of certiorari and Emprise Corporation is filing a separate petition, both of which present questions affecting this petitioner.

In the interests of brevity, petitioner hereby adopts the questions presented to this Court by his co-defendants, and respectfully urges that certiorari should be granted as to such Questions.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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